

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY W. LAMBERT

Claimant

VS.

DILLON COMPANIES, INC.

Self-Insured Respondent

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Docket No. 1,011,387

ORDER

Claimant appealed the February 1, 2005, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on April 22, 2005, in Wichita, Kansas.

APPEARANCES

Randy S. Stalcup of Wichita, Kansas, appeared for claimant. Scott J. Mann of Hutchinson, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The parties stipulated claimant injured his right knee on November 17, 2002, while working for respondent. Claimant also alleges that he later developed a low back injury as a direct and natural consequence of the right knee injury. But respondent contests the low back injury. In the February 1, 2005, Award, Judge Moore held claimant "failed to establish that he suffered a work-related injury to his low back"¹ and "failed to sustain his burden of proof of a 'permanent' injury to the low back that will support a rating under the AMA **Guides**"² Accordingly, the Judge awarded claimant permanent disability

¹ ALJ Award (Feb. 1, 2005) at 6.

² *Id.* at 7.

benefits under the schedules of K.S.A. 44-510d (known as the scheduled injury statute) for an 11 percent functional impairment to the right lower extremity.

Claimant contends Judge Moore erred. Claimant contends he developed a low back injury as a direct consequence of his right knee injury. Claimant argues he has a 20 percent functional impairment to the right lower extremity due to the right knee injury and a five percent whole person functional impairment due to the resulting low back injury, which combine for a 13 percent whole person impairment rating. Moreover, claimant argues he is now working less than full-time and he, therefore, has a 37.65 percent wage loss and a 64.7 percent task loss, which creates a 51 percent permanent partial general disability. Thus, claimant requests the Board to grant him a 51 percent work disability (a permanent partial general disability greater than the functional impairment rating) under K.S.A. 44-510e.

Conversely, respondent argues claimant has sustained a two percent functional impairment to his right lower extremity. Accordingly, respondent asks the Board to reduce the permanent disability rating and, thus, claimant's permanent disability benefits.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

For the reasons below, the Board affirms the conclusion that claimant is entitled to receive permanent disability benefits for an 11 percent functional impairment to the right lower extremity under the schedules of K.S.A. 44-510d.

The parties agreed that on November 17, 2002, claimant injured his right knee at work. The parties also agreed that claimant's accident arose out of and in the course of his employment with respondent. In December 2002, Dr. Kenneth A. Jansson operated on claimant's right knee.

Both Dr. Jansson and Dr. Daniel D. Zimmerman testified about the functional impairment claimant sustained due to his November 2002 right knee injury. Dr. Jansson, however, did not actually utilize the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) in concluding that claimant sustained a two percent functional impairment to the right lower extremity. Dr. Zimmerman, on the other hand, did ostensibly utilize the *Guides* in determining claimant's functional impairment and indicated claimant sustained a two percent functional impairment to the right lower extremity due to

the partial medial meniscectomy, using the diagnostic model of the *Guides*. But Dr. Zimmerman also concluded claimant sustained a 20 percent functional impairment to the right lower extremity using other provisions of the *Guides*.³ The doctor testified, in part:

There are other examination findings that must be considered. He had grating with repetitive passive flexion of the right knee. He had pain on palpation about the right knee. He was unable to do a full right knee bend because of pain in the right knee. 2 percent I don't believe fairly represented his residual impairment.⁴

The Workers Compensation Act requires that functional impairment ratings be determined using the AMA *Guides* (4th ed.) when the *Guides* addresses the impairment in question.⁵ Consequently, Dr. Jansson's opinion regarding claimant's functional impairment cannot be considered as he failed to utilize the *Guides*. Accordingly, the only functional impairment opinions the Board may consider are those from Dr. Zimmerman. But the record does not establish whether the two percent functional impairment rating or the 20 percent functional impairment rating to the lower extremity was derived by employing a more appropriate methodology under the *Guides*. Accordingly, the Board averages those ratings and finds that claimant has sustained an 11 percent functional impairment to his right lower extremity due to his November 2002 accident at work.

The Board affirms the Judge's conclusion that claimant is not entitled to any permanent disability benefits for his alleged low back injury. The Board concludes claimant has failed to establish that his alleged low back injury was a natural and probable consequence of the November 2002 right knee injury. Instead, the Board concludes it is more probably true than not that claimant's low back complaints are the result of a new and separate accident and, therefore, should not be compensated or considered in this claim.

In *Jackson*,⁶ the Kansas Supreme Court held that every natural consequence that flows from an injury, including a new and distinct injury, is also compensable under the Workers Compensation Act if it is a direct and natural result of the initial compensable injury. But that general rule was clarified in *Stockman*,⁷ which held that the *Jackson* rule did not apply when a worker sustained a new and separate accident:

³ Zimmerman Depo. at 21.

⁴ *Id.* at 40.

⁵ See K.S.A. 44-510d(a)(23) and K.S.A. 44-510e(a).

⁶ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁷ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973).

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.⁸

And whether a new and distinct injury is a natural and direct consequence of an initial compensable injury or whether the new injury resulted from a new and separate accident is a question of fact to be decided on a case-by-case basis.

Claimant alleges he began having low back complaints after he returned to his regular stocking duties at respondent's grocery store. When claimant initially returned to work, respondent accommodated his medical restrictions by providing a helper. But when claimant's helper was taken away, claimant performed all of his regular duties. And Dr. Zimmerman's testimony established that claimant's low back symptoms probably began due to the manner claimant was lifting at work.

The evidence, medical or otherwise, fails to establish that claimant's daily activities, other than his work, contributed to his low back complaints. Likewise, the record fails to establish that claimant's back symptoms were caused by an altered gait. Accordingly, the Board finds claimant's low back complaints should be the subject of a different claim and should not be considered in this claim as a natural or probable consequence of the right knee injury. Consequently, claimant's back complaints should be the subject of a separate claim.

In short, for reasons other than those provided in the Award, the Board affirms the Judge's conclusion that claimant is entitled to permanent disability benefits for an 11 percent functional impairment to his right lower extremity.

AWARD

WHEREFORE, the Board affirms the February 1, 2005, Award entered by Judge Moore.

IT IS SO ORDERED.

⁸ *Id.* at 263.

Dated this ____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Scott J. Mann, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director